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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968 No. 130

CHRISTINE SNIADACH,

Petitioner,

-v-

FAMILY FINANCE CORPORATION OF BAY VIEW and MILLER HARRIS INSTRUMENT COMPANY.

RESPONDENT'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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Respondent prays that the petition for a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in the above-entitled case on December 8, 1967, rehearing of which was denied February 27, 1968, be denied.

CITATION TO DECISIONS BELOW

The order of the Milwaukee County Court of Wisconsin (R. 118-120) is unreported and is set forth in the appendix, infra, p. 3b. The memorandum decision of the Milwaukee Circuit Court of Wisconsin (R. 101-110) is unreported and is set forth in the appendix, infra, p. 8b. The

decision of the Supreme Court of Wisconsin (R. 126-148) is reported at 37 Wis. 2d 163, 154 N. W. 2d 259 (1967), and is set forth in the appendix, infra, p. 176.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on December 8, 1967 (R. 126). Rehearing was denied on February 27, 1968 (R. 150).

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1257(3), petitioner having asserted below, and asserting here, deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Petitioner is a $65.00 per week wage earner. Half the wages due her were garnisheed before trial by plaintiff in a lawsuit against her. Under Wisconsin law, before petitioner's wages were garnisheed, she had no right to notice and hearing other procedure for challenging the legality of the garnishment sought by plaintiff. The plaintiff did not have to show that without garnishment, he would be unlikely to obtain jurisdiction over petitioner or to collect a money judgment, nor did he have to show probable cause to believe that petitioner owed him any money, nor any other reason purporting to justify denial of notice and hearing. Does this procedure deny due process of law secured by the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Wis. Stats. Sections 267.01, 267.02, 267.05, 267.07, 267.13, 267.16, 267.18, 267.20 (1967 Pocket Part.). They are set forth in the appendix infra, p. 20b.

STATEMENT

Petitioner Christine Sniadach is a wage earner and resident of Milwaukee, Wisconsin. Family Finance Corporation of Bay View (respondent here) is engaged in the finance and loan business. Petitioner on September 2, 1964 borrowed the sum of $1,800.00 from the respondent and as of the date of the institution of the original action, November 16, 1966, a balance of $1,500.00 was still due and owing. The garnishment commenced under Wisconsin garnishment law, Wis. Stats. Sections 267.01 et seq., was for back payments only not for the entire balance. Garnishee answer revealed that $31.59 was due and owing. The claim of the principal action for $420.00 has been stayed pending the outcome of this proceeding involving the Wisconsin garnishment law.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner sought by order to show cause in the County Court to dismiss the garnishment on the ground that the Wisconsin procedure for

pre-judgment garnishment deprived her of due process of law under the Fourteenth Amendment to the Federal Constitution. Hearing was pending and on January 7, 1967, Judge Thaddeus Pruss of the County Court held that "the garnishment action in the instant proceedings does not violate defendant's constitutional rights under . . . the United States Constitution 14th Amendment due process and equal protection" (R. 119).

On appeal to the Circuit Court of Milwaukee, petitioner argued that the garnishment statute "deprives the defendant of due process of law in violation of the Fourteenth Amendment to the United States Constitution because the defendant is given no hearing before being deprived of his property." The Circuit Court affirmed on March 15, 1967, stating that "defendant's argument rejects the fact that nothing has happened to the defendant's title except it is temporarily in suspension pending a final adjudication on the debt owed the plaintiff" (R. 105).

In the Supreme Court of Wisconsin argument was had between the petitioner and respondent and subsequently the same question of due process and equal protection was brought up and on December 8, 1967, the Supreme Court of Wisconsin affirmed the decision below holding that "Wisconsin's garnishment before judgment statutes do not deprive appellant of her property without due process of law" (R. 134). The Court quoted with approval the language of Byrd v. Rector, 112 W. Va. 192, 163 S. E. 845 (1932):

> (A) Defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted

to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon . . . Until (a final) judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp . . . (R. 134).

Two Justices of the Wisconsin Supreme Court dissented, their contention being "the test is whether he was deprived of his property" (R. 141).

REASONS FOR DENYING THE WRIT

I.

Garnishment procedure is essentially an issue of the Legislature and not of the Judiciary. In common law the remedy of garnishment was not known and as in our laws remedy is a creature of the Legislature. There is a clear distinction between legislative and Judicial acts. The Legislature makes the law; the courts apply it, In re Manufacturer's Freight Forwarding Co., 294 Mich. 57, 292 N.W. 678, 680 (1940), and also Scholberg vs. Itnyre, 264 Wis. 211, 58 N.W. 2d 648 (1952).

The before judgment garnishment statutes are a creature of the Legislature and a new right given to the creditor to pursue his remedy.

In Coffin Bros. & Co. v. Bennett, 277 US 29, 72 L. Ed. 768, 48 S. Ct. 422 (1927) at page 769, Justice Holmes states:

"...nothing is more common than to allow parties alleging themselves to be creditors to establish by attachment a lien dependent upon the result of the suit."

Skalecki v. Frederick, 31 Wis. 2d 496, 502 (1966) recognized the right of the Legislature to create such a remedy when it states:

"The general rule is that in absence of statutory authorization garnishment will not lie since it was unknown to the common law and it is completely statutory."

This was further set forth in Standard Oil v. Superior Court of New Castle County, 44 Del. 538, 69 S. Ct. 738 holds:

"A state may by appropriate legislation authorize attachment or garnishment of property within its borders subject to the limitations of the federal and state constitutions."

Respondent contends that the court is acting outside its function when it takes to changing a creature of the Legislature by judicial process, in fact, the State of Wisconsin by legislative action instituted a new garnishment law and procedure so that within a short time the law, as presently on the books, will be radically changed. This in itself is a clear indication that the Legislature saw the need for a change and took such action as was necessary to effect the change.

II.

Employees, or garnishee defendants are not deprived of their rights under the Due Process Clause.

Wisconsin Statutes 1965, 267.07 says in part:

> "...notice of such service (service on the garnishee) in substantial conformity with sub. (4), or a copy of the garnishee summons and complaint, together with the summons in the principal action, shall be served on the principal-defendant as required for the exercise of personal jurisdiction under Ch. 262 not later than 10 days after the service on the garnishee as provided in s. 262.06."

The Petitioner must agree that under the above statute notice is given the principal-defendant as required by due process. The Petitioner argued that she had no notice until after the property was seized. The answer to this is that no one finds out anything until after it happens. The Appellant argued that she should be notified prior to the notice being served upon the garnishee. The Respondent answered that due process requires only notice. It knows of no authority that requires notice be given at a particular time. Due process simply requires notice sufficient to allow the principal-defendant to appear and defend.

16A C. J. S. Constitutional Law, Section 619, page 808 states:

"... it is held that mere seizure of his property, as in attachment or garnishment proceedings constitutes sufficient notice."

The second requirement of due process is that there be a hearing to determine the liability of the parties. The Respondent submits that this requirement is met by the statutes questioned.

Wis. Stat: 1965 267.16 provides for a determination of liability in the principal action but 267.15 also allows for a judicial hearing in the matter of the garnishment itself. This statute allows the principal-defendant to defend again.

Phillips v. Commissioner of Internal Revenue, 283 US 589, 51 S. Ct. 608, 75 L. Ed. 1289 (1930) states:

"Where only property rights are involved, MERE POSTPONEMENT OF THE JUDICIAL INQUIRY IS NOT A DENIAL OF DUE PROCESS, if the opportunity given for the ultimate judicial determination of the liabilities is adequate."

16 Am. Jur, 2d Constitutional Law, Section 576, page 980, states:

"A party must not be deprived of his property without a judicial hearing, but the stage of proceedings at which the hearing shall take place and the manner in which the cause of the party shall be brought before the judicial tribunal, provided it is not an unreasonably inconvenient and embarrassing one, are within the legislative power.

Due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered."

This last principle was upheld in Boynton Cab Co. v. Giese, 237 Wis. 237, 296 N.W. 630 (1941).

16 Am. Jur. 2d, supra, page 981 states:

"From the foregoing it follows, that although it is the general rule that everyone is entitled to a hearing as an essential part of due process of law, a statute is not merely unconstitutional because it authorizes a ministerial act by which possession of property is taken before the right to it has been judicially determined."

The petitioner argued that the creditor has not opportunity for hearing. The Respondent asserts that because there is not an early hearing the principal-defendant cannot plead his exemptions. In Pierce v. Chicago & Northwestern Railway Co., 36 Wis. 283, 287 states:

"...if the garnishee knows that the property, money or indebtedness in his possession or under his control, is exempt, it is his duty for self protection, to bring that fact to the notice of the court."

In fact, the creditor, by proper pleadings could have petitioned the court for an immediate trial which has in the past and at the present time been normally granted by the courts. In the case of Henderson v. Mutual Fertilizer Company (S. C., Ga., 1920) 104 S.E. 229, the court

held that the garnishment process was not a deprivation of due process of law or of the equal protection of law as guaranteed by the Constitution of Georgia or the United States.

In Eagleson vs. Rubin (S. C., Ida., 1909), 100P 765 it was held that "Due Process of Law" as used in the Constitution of Idaho and the United States as applied to judicial proceedings means that every litigant shall have the right to have his cause tried and determined under the rules of procedure, the same as applied to other similar cases; and when this is afforded him, a defendant cannot claim that due process of law is not being observed.

(Also See: Grannis vs. Ordean, 34 S. C. 779)

Not only do the Wisconsin Statutes meet the due process requirements and provide sufficient protections, statutes of this type have been upheld.

16A C. J. S. Constitutional Law, Section 613, page 762 states:

> "Particular provisional remedies which have been held as not denying due process under the circumstances include . . . garnishment. . . . "

6 Am. Jur. 2d Attachment & Garnishment, Section 5, page 563 states:

> "An attachment or garnishment is not a deprivation of property without due process of law within the meaning of constitutional

provisions, inasmuch as there must be an adjudication of the rights of the parties before the property can be subjected to the plaintiff's claim."

The leading case in this area is Byrd v. Rector, 163 S.E. 845, 81 A.L.R. 1213, 1216 (1932), wherein a garnishment before judgment statute was questioned, the court there said:

> "We think the answer to these propositions is that the defendant is not deprived of his property by reason of the levy of the copy of the attachment upon a person who is indebted to him or who has effects belonging to the defendant. The most that such procedure does is to deprive the defendant of the possession of his property temporarily by establishing a lien thereon. Whether the defendant shall be deprived of such property must depend of course upon the plaintiff's subsequent ability to obtain a judgment in personam or in rem on his claim against the defendant. If, after having full opportunity to be heard in defense of such claim, a judgment is rendered thereon against the defendant or his property, there has been no lack of due process."

In McInnes v. McKay, 141 A. 699 (1928), wherein a statute like the one herein questioned was being questioned, the court there stated:

> "... it is not a deprivation without due process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized

tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied."

The Respondent submits that due process is met by the statutes questioned because notice and opportunity for a hearing are present and that further protections are present to secure the debtor's rights.

The more recent case United States v. Department of Corrections of State of Delaware, 268 F.S. 242 (1967) answering the question of the posting of a bond, the petitioner argued that there was a violation of the Equal Protection Law Clause inasmuch as a person similarly charged with one offense who could post bond, would avoid any further police interrogation while he, as one unable to meet bond requirements, was not given equal protection of the law with one who could make bail. The court there was not given equal protection of the law. In that case the court stated, "a state can, consistently with the 14th amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination'. Absolute equality is not required; lines can be and are drawn and we ought to sustain them."

GARNISHMENT AS A WEAPON FOR COLLECTION.

Petitioner in her argument dwelled upon the cases of unscrupulous merchants and lenders whose practices trap the so-called "unwilling workers." Today, in a socially conscious society the pendulum is swinging to protect the consumer. The Respondent agrees that there

are injustices in the garnishment and replevin attachment procedures but nothing is said about the average creditor who in most cases does not garnishee within 10 days but only after numerous notices and requests for payment are made over a long period of time.

It appears no one is concerned with the creditor who has either advanced monies "dollar for dollar" or merchandise which is consumed or used by the debtor without regard for his obligation to repay or return the merchandise used or the monies borrowed.

In the matter before the court the account in question was delinquent in excess of 2 years before any legal action was taken.

Petitioner states that garnishment is generally the weapon of predatory creditors. In our shifting society where debtors move from day to day or week to week it is the only method by which a merchant or lender can get his money or in the case of a replevin his merchandise.

The garnishment situation involved herein reminds the Respondent of the situation when employers had the upper hand over labor organizations and employees, subsequently, legislation was passed favoring labor. It appears now that there is an attempt to bring the equality between labor and management so that both parties will have equal rights and equal protection.

With the forthcoming Uniform Consumer Credit Code the consumer is getting needed protection and with the passage of the Consumer

Credit Protection Act a debtor will be receiving needed and long overdue protection. In both instances, these are actions of the legislature and not the judiciary.

Respondent is confident that after both of the actions referred to above as well as the new garnishment procedure as proposed by the Wisconsin Legislature have been in effect, changes will be made so that there is equal protection of both the lender and the borrower.

CONCLUSION

WHEREFORE, respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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